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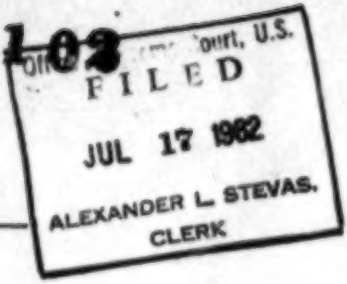

No._____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

Foy Haskell Dawkins and
Mary Lorena Dawkins, Petitioners,

v.

Jody Dawkins Fenslage, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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No.____

In the

SUPREME COURT OF THE UNITED STATES

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v.

Jody Dawkins Fenslage, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Foy Haskell Dawkins and Mary Lorena Dawkins, petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled and numbered case on March 24, 1982.

QUESTIONS PRESENTED

1. Whether the evidence was undisputed that the judgment debtors were entitled to a 200 acre rural homestead exemption?

2. The judgment debtors' property having been sold at execution sale pending appeal, the judgment having been affirmed within 90 days of the filing of his petition in bankruptcy, is the transfer thereby validated a voidable preference under Bankruptcy Code, 11 U.S.C. §§522, 547?

3. Whether the debtors' right to jury trial on the homestead issue was illegally denied them?

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OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is unreported. It is copied in the Appendix, infra, page 30. The judgment of the Court is copied in the Appendix at page 37. Opinions of the District Court for the Northern District of Texas, Amarillo Division, and of the Bankruptcy Court in that Division, are copied in the Appendix at pages 41 and 47 respectively.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals (Appendix, infra, page 37) was entered on March 24, 1982. A timely petition for rehearing was denied on April 21, 1982 (Appendix, infra, page 39). The jurisdiction of the Supreme Court is invoked under 11 U.S.C. 1254 (1). The trial court's judgment and opinion are printed in the Appendix at page 47.

CONSTITUTIONAL PROVISIONS AND STATUTES

11 USC Bankruptcy Code

§522 Exemptions

(b) . . . an individual debtor may exempt from property of the estate . . .

(2) . . . any property that is exempt under . . . State or local law that is applicable on the date of the filing of the petition . . . .

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection [b] of this section, if such lien is--

(1) a judicial lien....

(g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection [b] of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property;. . .

(h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if--

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title; and

(2) the trustee does not attempt to avoid such transfer.

(i)(1) If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title, the same as if the trustee had avoided such transfer, and may exempt any property so recovered under subsection (b) of this section.

(2) Notwithstanding section 551 of this title, a transfer avoided under section 544, 545, 547, 548, 549, or 724(a) of this title, under subsection (f) or (h) of this section, or property recovered under section 553 of this title, may be

preserved for the benefit of the debtor to the extent that the debtor may exempt such property under subsection (g) of his section or paragraph (1) of this subsection.

. . .

§547 Preferences

. . .

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of property of the debtor--

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made--

(A) on or within 90 days before the date of the filing of the petition. . . and . . .

. . .

(5) that enables such creditor to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

. . .

(e)(1) For the purposes of this section--

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee;

. . .

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made--

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days;. . .

. . .

(f) for the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

§550. Liability of transferee of avoided transfer.

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

. . .

§551. Automatic preservation of avoided transfer.

Any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or any lien void under section 506(d) of this title, is preserved for the benefit of the estate but only with respect to the property of the estate.

ART. 16, TEXAS CONSTITUTION

Sec. 50. Homestead; protection from forced sale; mortgages, trust deeds and liens.

The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, . . . No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void.

§51. Amount and value of homestead; uses

The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot, or lots, not to exceed in value Ten Thousand Dollars, at the time of their designation as the homestead, without reference to the value of any improvements thereon; provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the homestead claimant, whether a single adult person, or the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.

Art. 3833, Homestead

(a) if it is used for the purpose of a home, or as a place to exercise the calling or business to provide for a family or a single, adult person, not a constituent of a family, the homestead of a family or a single, adult person, not a constituent of a family, shall consist of:

(1) for a family, not more than two hundred acres, which may be in one or more parcels, with the improvements thereon, if not in a city, town, or village; or

(2) for a single, adult person, not a constituent of a family, not more than one hundred acres, which may be in one or more parcels, with the improvements thereon, if not in a city, town, or village; or

(3) for a family or a single, adult person, not a constituent of a family, a lot or lots, not to exceed in value ten thousand dollars at the time of their designation as a homestead, without reference to the value of any improvements thereon, if in a city, town, or village.

Art. 3835. Interests in land exempt from satisfaction of liabilities.

The homestead of a family or a single, adult person, not a constituent of a family, and a lot or lots held for the purposes of sepulchre of a family or a single, adult person, not a constituent of a family, are exempt from attachment, execution and every type of forced sale for the payment of debts, except for encumbrances properly fixed thereon.

STATEMENT OF THE CASE

Material facts

Acting pursuant to a levy in execution of a federal court judgment the United States Marshal on November 7, 1978, sold 320 acres of Petitioners' farmland. Respondent Jody Fenslage was the successful bidder. Petitioners, against whom the judgment had been entered on August 17, 1978, had perfected an appeal to the United States Court of Appeals, but had not posted a supersedeas bond. On November 6, 1980, the judgment was affirmed. Fenslage v. Dawkins, 629 F.2d 1107 (5th Cir.1980) .

On February 2, 1981, Petitioners filed a Chapter XI Bankruptcy Proceeding in the Northern District of Texas after they had filed in state court a suit to avoid Fenslage's deed, insofar as it conveyed a 200 acre portion of the property claimed to have been their homestead.

In the Debtor's petition conveyance of the land by the U.S. Marshal was alleged to be a voidable preference proposed to be set aside by adversary proceedings.

Respondent caused the state court suit to be removed to the U.S. District Court and it was (in "ten minutes" as counsel for Respondent put it) from there removed to the Bankruptcy Court.

Within seven days of the notice of removal to the United States District Court Petitioner filed pleadings clearly delineating his request for jury trial as such time as the adversary proceeding relating to the homestead issue should come before the Court.

Before hearing was held in the Bankruptcy Court on the homestead issue Petitioners had asserted that the transfer of the proceeding to the Bankruptcy Court from the District Court was premature. It was also apparent that the Petitioners were insisting upon their right to resist the removal of the case to the District Court from the state court and they placed the Court and all parties on notice that at the appropriate time they wished to have the right to trial by jury respected. But the Bankruptcy Judge proceeded to a hearing on all issues and Petitioners were not granted their right of trial by jury on the important homestead issue of the case.

The disposition of the issues before the Bankruptcy Court is clearly set forth in the opinion of the Court of Appeals in the Appendix.

Jurisdiction in the Courts below

Jurisdiction is conferred on the Bankruptcy Court and the United States District Court by Pub. L. 95-598, Title IV, § 405, Nov 6, 1978, 92

Stat. 2686--28 U.S.C. §§1334, 1471. The decision of this Court in Northern Pipeline Const. Co. v. Marathon Pipe Line Co, 50 L.W. 4892 (June 28, 1982), while it holds essential features of this legislation unconstitutional, and while it would perhaps force the conclusion that fundamental error was committed in the proceedings below and in the Fifth Circuit Court, is ordered to have effect only on October 4, 1984. The net effect of the determination that the holding applies prospectively only is that the 1978 Bankruptcy legislation effectively controlled the proceedings below.

ARGUMENT

1. The evidence was undisputed that the judgment debtors were entitled to a 200 acre rural homestead exemption.

There was no dispute in the evidence at the hearing in the Bankruptcy Court that Petitioners had been farming the land and using it for the calling of farming and in order to provide for their family for over 50 years. This use was continued, uninterrupted, before and after the entry of the judgment against Petitioners which triggered the execution sale. The fact that Petitioners physically resided in an urban dwelling rather than on the farm is no impediment to their right to the 200 acre rural homestead exemption under the Texas Constitution.

Petitioners, subsequent to the filing of the abstract of judgment on March 17, 1978, sold their urban residence to their daughter. They later claimed the proceeds of her purchase money note to be exempt under a Texas statute which exempts proceeds of the sale of the homestead from garnishment. Much was made of this in the Bankruptcy Court. It is the only evidence in the record of a claim of the urban residence as the exempt homestead. The undisputed testimony of 50 years of use and occupancy of the rural homestead, and the claim of it as such, however, completely obliterates the contention that the urban residence had been elected by the Petitioners as the single homestead to which they were entitled under Texas law.

A key Texas opinion is Ray v. Metzger, 165 S.W.2d 207 (Tex.Civ.App. 1942) affirmed 172 S.W.2d 480. In this case Defendant had given a deed of trust covering dedicated lots in a rural subdivision. The suit was to foreclose the deed of trust. The defense was that the property was rural homestead. The creditors' attack on the exemption was the theory that the rural homestead had been abandoned by the dedication of the lots, their placement on the market for sale, and that the debtor had thereby limited his homestead to the single lot upon which we was residing when the deed of trust was executed.

Significantly, the debtor in the deed of trust expressly disclaimed all of the lots, except the one as his homestead, and expressly so designated it. The dedication of the subdivision was filed of record on June 16, 1938, and the deed of trust was executed on August 5, 1938. The court said:

". . . . We are also familiar with the line of decisions in this state which in effect hold that if the homestead claimant is in actual possession of and is occupying and using premises for homestead purposes, his declarations and representations (oral or written) to the contrary, will not deprive him of the constitutional protection against encumbrances of the homestead." 165 S.W.2d at 209

The occupancy and use of the rural homestead as a place for the exercise of the family farming business established the rural homestead and Petitioners' contradictory assertion in the matter of the garnishment of their daughter's note affects the case not one whit.

The court further stated:

"Whether or not lands constitute a homestead depends at least to some extent upon the intentions of the owner; perhaps the best evidence of that intention is occupancy and use. When the right once attaches it presumptively continues until abandoned by the claimant. The burden is on the one who asserts abandonment to establish it as a fact by competent and convincing proof.

* * *

"Our courts have jealously guarded the constitutional inhibition of encumbering the homestead except for the purposes therein enumerated. The wisdom of these constitutional provisions cannot be successfully attacked. A sound public policy demands it." 165 S.W.2d at 210.

It was undisputed that the use and occupancy of the rural homestead as contemplated by the Texas Constitution had endured for 50 years and had therefore had its commencement years before acquisition of the urban residence. The burden of proving the abandonment of the rural homestead in order to invest the urban residence with the quality of the single homestead permitted by Texas law was Respondent's. But there was no attempt to meet the burden in any way. Instead the hearing proceeding upon the fallacious notion that the burden was upon the Petitioners to prove that they had abandoned the urban dwelling prior to the filing of the abstract of judgment on March 17, 1978. The date of the sale of this property, March 26, 1978, was therefore deemed conclusive on the entire issue.

The findings of fact and conclusions of law of the Bankruptcy Judge were clearly erroneous.

2. The judgment debtors' property having been sold at execution sale pending appeal, the judgment having been affirmed within 90 days of the filing of his petition in bankruptcy, the transfer thereby validated is a voidable preference under Bankruptcy Code, 11 U.S.C. §547.

If the Court of Appeals had reversed the judgment against Petitioner it is clear that the Marshal's deed would have been an utter nullity.

"The judgment of the trial court may be enforced during the pendency of an appeal therefrom, unless such judgment is suspended by the giving of a proper supersedeas bond, as prescribed by law. Consequently, where the judgment of the trial court is enforced by the party prevailing in that court, and then, subsequently to such enforcement, the appellate court reverses the judgment, the party who received the benefits of prior enforcement of the judgment will then be required to restore such benefits to the party prevailing on the appeal." 6 Tex.Jur.3d 371, citing Stroud v. Casey, 25 Tex. 740, Peticolas v. Carpenter, 53 Tex. 23; Tex. T.R. Co. v. Jackson, 85 Tex. 605, 22 SW 1030; Branigar v. Henderson Hardware Co. (CA 95 SW2d 740; King v. Rubinsky, (CA 253 SW2d 937).

"Furthermore, the Defendant, on or before delivering the property relinquished by him on such prior enforcement of the judgment, is not required to protest or give notice of his intention to appeal. On the contrary, the plaintiff in such a case is charged with notice that the defendant may subsequently take an appeal from the judgment of the trial court. Accordingly, insofar as the plaintiff is concerned in such case, an obligation to refund or restore such

property is deemed to arise at the time of the defendant's surrender thereof." 6 Tex.Jur. 3d. 372, citing Cleveland v. Tufts, 69 Tex. 580, 7 SW 72.

"If a party recovers land in a real property action and takes possession of the property under an execution issued prior to the appeal from the judgment, and if the judgment, on the taking of the appeal is reversed, then, insofar as the rights of the party thus taking possession are concerned, his title is at an end and he may be compelled to relinquish his possession." 6 Tex. Jur. 3d 372, citing Stroud v. Casey, supra.; Liquid Carbonic Co. v. Logan, (CA) 79 SW 2d 632.

These principles are applicable to federal court procedure.

"Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought . . . . " Rule 69 F.R.C.P. . .

11 Bankruptcy Code §547 (e) (1) (A) delays the effectiveness of a transfer of real property until perfection. Perfection is completed

"when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee...." (emphasis supplied)

The title of the purchaser at the execution sale under Texas law is not perfected until the

judgment which supports the sale has become final and nonreviewable. This may occur if the judgment debtor fails to perfect an appeal. It may also occur if the judgment debtor appeals but not until the judgment is affirmed or until the appeal is otherwise disposed of. If the judgment debtor appeals, the deed of the Marshal or the Sheriff is a total nullity insofar as the purchaser at the sale is concerned as well as those persons who take an interest in the property from the purchaser with notice of the circumstances.

"However, an attorney for the plaintiff is not a purchaser without notice within the meaning of this rule. Consequently, a reversal of the judgment will terminate his title." 6 Tex. Jur. 3d 375, citing Stroud v. Casey, supra, Cleveland v. Tufts, supra.

Less than three months before the filing of the debtor's petition, the debtor was still in possession of the property, still farming and ranching, still claiming the property as homestead and still pursuing his rights and remedies provided by law in the pursuit of his claim.

Given the larger perspective of the purposes of the Bankruptcy Code, the avoidance of the Marshal's deed as a preference is clearly consistent therewith. Petitioners sought a Title XI Reorganization only after their unsuccessful appeal had concluded. But their very appeal of the substantial judgment against them was also

aimed at resolution of their debt structure by resistance to the imposition of respondent's claim against them.

The judicial transfer of the property depended upon the occurrence of at least four indispensable events: (1) a valid judgment; (2) levy by the Marshal on the property; (3) sale of the property by the Marshal and the execution and delivery of his deed to the purchaser; and (4) the finality of the judgment, ie., failure of the defendant to appeal it or its affirmance or the dismissal of the appeal.

Much of the discussion in the lower courts dealt with the significance of the abstract of judgment. However, the abstract of the judgment was not at all necessary to the Marshal's sale. Under Texas law, an abstract of Judgment filed in the county records places a lien on the real estate standing in the name of the debtor in the county in which it is abstracted. It does not precipitate a sale nor is it necessary that the judgment be abstracted in order for a sale to occur.

The Marshal must, however, levy on the property if he is to sell it.

He must hold the sale, strike the property off to the highest bidder, and execute a deed to the successful purchaser.

But having done all of this, under Texas law, the title of the purchaser, if the judgment is not yet final, is only a potential title until the judgment becomes final.

The judgment cannot become final unless the judgment debtor fails to perfect an appeal, or if he perfects one the appeal is disposed of, either by affirmance or dismissal. If judgment is reversed, it is as if it never existed.

It cannot be said during the pendency of an appeal that a bona fide purchaser cannot acquire a good title from the judgment debtor. That can only be said after the judgment is affirmed or the appeal dismissed.

And accordingly the last and final essential event in the transfer occurred within 90 days of the filing of the debtor's petition.

Petitioner's effort to secure the avoidance of the transfer by the Marshal's deed was appropriate under XI Bankruptcy Code, §522 (f,g,& h).

In Durrett vs. Washington National Ins. Co, 621 F.2d 201 (5th Cir.1980) an analysis of the transfer of title from a debtor to the holder of a Texas deed of trust by private foreclosure sheds light on the issue in the instant case.

The court first considered the statutory definition of "transfer" in the former Bankruptcy Act:

". . . the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title of property delivered to a debtor shall be deemed a transfer suffered by such debtor." 11 U.S.C. §1(30).

The following quotation from the court's opinion illustrates the point in the instant case.

"The comprehensive character of this definition leads us to conclude that the transfer of title to the real property of the debtor in possession pursuant to an arrangement under Chapter XI of the Act, by a trustee on foreclosure of a deed of trust, to a purchaser at the sale constitutes a 'transfer' by a debtor in possession within the purview of §67(d). The actual transfer of title was made by Durrett to Fields, as Trustee via the deed of trust, executed April 7, 1969, to secure an indebtedness then owing to Southern T and thereafter assigned to Washington. Possession of the property was retained by Durrett subject to the power of the Trustee to sell and deliver possession of the property, on default, at a foreclosure sale. While the actual conveyance of title by Durrett was made on April 7, 1969, possession was retained until foreclosure of the deed of trust. The 'transfer' within the contemplation of the act was not final until the day of the foreclosure sale, January 4, 1977. This was accomplished within the one-year period provided by §67(d)(2), 11 U.S.C. §107(d)(II)." 621 Fed.2d at 204.

The Durrett case was followed in Abrahamson v. Lakewood Bank & Trust Co., 647 Fed. 2d 547 (Fifth Cir. 1981).

In the case at bar petitioners were still in possession of the real estate sold by the Marshal when they filed their debtor's petition.

3. Petitioners' right to jury trial on the homestead issue was illegally denied.

Petitioners filed on February 27, 1981, their motion and answer to the matters posed by the removal of the state court suit to the federal court. It is the pleading from which the district judge quoted the passages in which Petitioners sought trial by jury. Judge Robinson, and the Fifth Circuit agreed, held that the language used did not constitute a "demand" for jury trial. But the passages:

"Prior to the occasion of a time set for a hearing on an Adversary proceeding, these Debtors are by law permitted an opportunity to then elect whether or not Debtors may desire a trial by jury"

and

"Authorization for an election of trial by jury should be afforded both parties prior to a time setting of an adversary hearing."

must be taken in context. The "Motion and by way of Answer" in which the passages appear

was a response to the pleadings of Respondent in the removed state court suit. That pleading was an answer and counterclaim to the petition filed by these Petitioners and it sought a declaration of title and the cancellation of Petitioners' claim thereto as a cloud on title.

But there were multiple parties in the state court proceeding. Respondent's attorneys were parties, they having taken assignments of interests in the land in satisfaction of contingent fees for which they had contracted.

Also included in the litigious barrage of pleadings, charges, denials, allegations, and counter-demands were motions to lift the automatic stay of the Bankruptcy Code triggered by the debtors' petition, motions to dismiss the Title 11 proceeding, and the like. Petitioners sought to bring order out of the considerable confusion by placing before the Bankruptcy Judge the proposition that his undertaking the adjudication of all matters potentially placed before his would be premature.

Petitioners sought by their pleadings his ruling on essentially the following questions, each of which was necessarily to be resolved before further proceedings:

Which of the adversary proceedings removed to the district court and then "within 10 minutes" removed to the bankruptcy court were to be adjudicated in the bankruptcy court?

To what extent were the Respondent's attorneys, as her assignees and grantees, before the court for the adjudication proposed to be made?

Was the removal of the state court proceeding by Respondent, Petitioners' judgment creditor, an act forbidden by the automatic stay of the Code?

Was the affirmance of the Fenslage judgment against Respondents within 90 days of the filing of the bankruptcy petition the last event of a "transfer" as contended elsewhere in this petition for certiorari?

There were others, but these contentions were of such a nature that any one of them, if the Bankruptcy Judge had sustained Petitioner, would have resulted in substantial repleading of the issues and the claims and demands to be litigated subsequently, if ever.

That the Bankruptcy Judge eventually overruled Petitioners' contentions is of no moment in the consideration of the sufficiency of the request for jury trial. In the context of the status of the case at that time the manner of the articulation of the request, the choice of phrasing, and the reference to the "election" as a future matter to be attended to, do not detract from the clear and unequivocal message given by counsel to the court and opposing counsel that Petitioner, when the time should come for a trial on the fact issue of homestead, demanded jury trial.

In the face of this reality it was patent error for the district judge and the Court of Appeals to hold that Petitioners had not requested jury trial.

This Court said in Dairy Queen v. Wood, 369 U.S. 469, 8 L.Ed2d 44, 82 S.Ct. 894 (1962)

"But the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings." 369 U.S. at 478

And, citing the Dairy Queen case, the Second Circuit in Robine v. Ryan, 310 F.2d 797 (1962). said

"It is equally clear from that case that ambiguities and inelegancies in a pleading will not defeat a demand for jury trial so long as it reasonably appears that the substance of what is pleaded constitutes a claim for relief at law."

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted

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Attorneys for Petitoners

By: _____

CERTIFICATE OF SERVICE

I, E. Byron Singleton, a member of the Bar of the Supreme Court of the United States and one of counsel of record for Petitioners herein hereby certify that on the 16 day of July, 1982, pursuant to Rule 33 of the Supreme Court Rules, I served three copies of the foregoing petition for writ of certiorari on the Respondent as follows:

By depositing such copies in the United States Post Office, Amarillo, Texas, with first class postage prepaid, properly addressed to the post office address of Cary Schacter, of Whittenburg, Whittenburg & Schacter, attorneys of record for Respondent, Jody Dawkins Fenslage, towit: P.O. 31718, Amarillo, Texas, 79120.

All parties required to be served have been served.

Dated July 16, 1982.

_____

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One of counsel for
Petitioners

No.____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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Mary Lorena Dawkins, Petitioners,

v.

Jody Dawkins Fenslage, Respondent

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1502

In the Matter of
FOY HASKELL DAWKINS and
MARY LORENA DAWKINS, Debtors

FOY HASKELL DAWKINS and
MARY LORENA DAWKINS,
Appellants,

versus

JODY DAWKINS FENSLAGE,
Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(March 24, 1982)

Before RUBIN, SAM D. JOHNSON and GARWOOD, Circuit Judges.

RUBIN, Circuit Judge:

Acting pursuant to a levy in execution of a federal court judgment, duly recorded in the records of Armstrong County, Texas, the United States Marshal sold a half-section of ranch land on November 7, 1978. The judgment creditor, Jody Fenslage, was the successful bidder. The former landowners and judgment debtors, Foy Haskell Dawkins and Mary Lorena Dawkins, filed

suit in state court to void Fenslage's deed insofar as it conveyed a 200-acre portion of the property, claimed to have been their homestead. The case was properly removed to federal district court, then transferred promptly to bankruptcy court, in accordance with the local rules of court, because the judgment debtors had filed Chapter XI bankruptcy proceedings. The Dawkinses protested that the property sold had been their homestead and that the 1978 judgment lien, for the satisfaction of which the property was sold, was a voidable preferential transfer. The bankruptcy court dismissed the suit. The district court affirmed the dismissal and also held that the Dawkinses had not been entitled to a jury trial in bankruptcy court. We affirm.

Jody Fenslage recovered a judgment against the Dawkinses and others. On August 17, 1978, an abstract of this judgment was filed, indexed, and recorded in records of the Armstrong County Clerk in accordance with Tex. Rev. Civ. Stat. Ann. arts. 5447-5448 (Vernon 1958 & Cum. Supp. 1981), as amended by id. art. 1941(a) (Vernon Supp. 1965-1981). The Dawkinses posted no supersedeas bond, but appealed the judgment to this court. On October 6, 1978, while the case was pending on appeal, the United States Marshal levied on the half-section, and, on November 7, he sold it. Two years later, on November 6, 1980, we affirmed the Fenslage judgment. Fenslage v. Dawkins, 629 F.2d 1107 (5th Cir. 1980). On February 2, 1981, the Dawkinses filed a petition in bankruptcy seeking relief under Chapter XI.

In 1981 the Dawkinses filed this suit in state court to void the Marshal's sale. On February 13 their suit was removed to federal district court and transferred to the bankruptcy court. The bankruptcy court held that the property was not the Dawkinses' homestead, that it was not, therefore, exempt under Texas law, and that the judgment lien was not a preferential

transfer. In re Dawkins, 11 B.R. 213 (Bankr. W.D. Tex. 1981).

The Dawkinses assert that a 200-acre portion of the half-section was their homestead because they had farmed it for fifty years. Yet when the sale occurred, there was neither house nor home on this property. The Dawkinses lived in a nearby community, Claude, and had indeed claimed the Claude residence as their homestead.

As the district court noted, under Tex. Rev. Civ. Stat. Ann. art. 5449 (Vernon 1958), an abstract of judgment operates as a lien from the date of proper recording. Accord, e.g., TPEA No. 5 Credit Union v. Solis, 605 S.W.2d 381, 383 (Tex. Civ. App. 1980); Askey v. Power, 36 S.W.2d 446, 447 (Tex. Comm'n App. 1931). The lien on the property runs from the date of recording, notwithstanding the filing of an appeal from the judgment. See Texas Trunk R.R. v. Jackson, 22 S.W. 1030, 1031 (Tex. 1893); Semple v. Eubanks, 35 S.W. 509, 510, (Tex. Civ. App. 1896). McDonald v. Ayres, 242 S.W. 192, 195 (Tex. Comm'n App. 1922). In this case, on the date the judgment was recorded, the 200-acre property was the home of no one. Conceding this, the Dawkinses contend that the property was used "as a place to exercise [their] calling or business to provide for [their] family" and was, for that reason, a homestead. Tex. Rev. Civ. Stat. Ann. art. 3883(a) (Vernon Cum. Supp. 1981).

That argument, however, must fail, for the bankruptcy court properly found that a debtor can have but one homestead at a time, and that, on August 17, 1978, the Dawkinses' homestead was in Claude, at 404 Wilson Street.[1] The party who claims a homestead exemption bears the burden of proving the existence of the homestead. See Burk Royalty Co. v. Riley, 475 S.W.2d 566, 568 (Tex. 1972); Campbell v. First Nat'l Bank, 88 S.W.2d 1084, 1086 (Tex. Civ.

App. 1935); Taylor v. First Nat'l Bank, 288 S.W. 235 (Tex. Civ. App. 1926). Without an abandonment of an existing homestead, homestead status cannot be affixed to another property. Archibald v. Jacobs, 6 S.W. 177, 178-79 (Tex. 1887); Floyd v. Rice, 444 S.W.2d 834, 836 (Tex. Civ. App. 1969); Towery v. Plainview Bldg. & Loan Ass'n, 99 S.W.2d 1039, 1041 (Tex. Civ. App. 1936). And the mere intention to abandon one homestead and to create another does not suffice to divest the original homestead of its original character. Archibald v. Jacobs, 6 S.W. at 178 ("Abandonment of property actually homestead cannot be accomplished by mere intention."); Major v. Loy, 155 S.W.2d 617, 623 (Tex. Civ. App. 1941) ("A homestead cannot be acquired by mere intention alone."); Markum v. Markum, 210 S.W. 835, 841 (Tex. Civ. App. 1919). Even if, prior to August 17, 1978, the Dawkinses had been planning the sale of the property at 404 Wilson Street and the building of a new residence on the half-section of ranch land, they did not perform acts sufficient to demonstrate abandonment of their present homestead. As a result, when the judgment lien attached, the Dawkinses' homestead remained at 404 Wilson Street. See Ray V. Metzger, 165 S.W.2d 207, 210 (Tex. Civ. App. 1942)("Whether or not lands constitute a homestead depends at least to some extent upon the intention of the or; perhaps the best evidence of that intention is occupancy and use."), aff'd., 173 S.W.2d 480 (Tex. 1943).

Absent the posting of a supersedeas bond, the federal court appeal did not suspend execution of the judgment. Because the lien was perfected in 1978, the subsequent sale, in November 1978, was proper. The recording of the lien was not a preferential transfer because it occurred more than three months, indeed two years, before the bankruptcy petition was filed. 11 U.S.C. §547 (Supp. IV 1980). The later affirmance of the district court's judgment by

this court was not necessary to perfect the judgment lien. Thulemeyer v. Jones, 37 Tex. 560, 571 (1872); Smith v. Kale, 32 Tex. 290, 294 (1869); Roman v. Goldberg, 7 S.W.2d 899 (Tex. Civ. App. 1928).

The Dawkinses also contend that they were improperly denied a jury trial. The local bankruptcy rules require that a specific demand for a jury trial be made within ten days after removal. Bankr. N.D. Tex. R. 7004(g). The Dawkinses never demanded a jury trial although they stated that they might later elect to do so. Fenslage contends, and the Dawkinses do not deny, that the Dawkinses announced that they were ready for trial and proceeded to bench trial without protest, and that even in their posttrial memorandum, they never objected to the bench trial. They have, therefore, waived their right to demand a jury trial. Duncan v. First Nat'l Bank, 597 F.2d 51, 54-56 (5th Cir. 1979); Bush v. Allstate Ins. Co., 425 F.2d 393, 395-96 (5th Cir.), cert. denied, 400 U.S. 833, 91 S. Ct. 64 (1970); Chandler Supply Co., v. GAF Corp., 650 F.2d 983, 986-87 (9th Cir. 1980); Transocean Air Lines v. Pan American World Airways, Inc., 36 F.R.D. 43, 45 (S.D.N.Y. 1964)("There is no longer any occasion to indulge any presumption against waiver.").

The other issues merit only passing comment. Much is made of the fact that the transfer to the bankruptcy court occurred ten minutes after the case was removed to federal court. No question concerning the propriety of the removal is raised. Once removed, the case was properly transferred to the bankruptcy court, and it was unnecessary for the party seeking transfer to file notice of a hearing. Because of the pendency of the Chapter XI proceeding, the bankruptcy court exercised all jurisdiction over the matter, 28 U.S.C.§1471(c) (Supp. III 1979); see Cross Elec. Co., v. United States, 512 F. Supp. 511, 512 (W.D. Va. 1980),

for, if the sale of the alleged homestead had been set aside, the property would have become part of the Dawkinses' estate, 11 U.S.C. §749. Had the transfer been procedurally improper, the proper course for the Dawkinses would have been to file a motion to transfer the case back to the district court. 28 U.S.C. §1478(b) (Supp. III 1979); In re Ebrights Refrigeration Equip., 13 B.R. 546, 548-49 (Bankr. S.D. Ohio 1981); In re. Sulzer, 7 B.R. 475, 476 (Bankr. S.D.N.Y. 1980). See generally Harris v. Edward Hyman Co., 664 F.2d 943 (5th Cir. 1981).

Finally, the Dawkins contend that the property was sold for inadequate consideration. This issue, however, was not raised below, no evidence of inadequate consideration was offered at the trial, and the burden of proof of this issue was on the Dawkinses. Thus we decline to consider this contention. E.g., Equitable Trust Co. v. Commodity Futures Trading Comm'n, No. 81-1020, slip op. at 1126 (5th Cir. Mar. 3, 1982); Jackson v. United States Postal Serv., 666 F.2d 258, 260-61 (5th Cir. 1982)(per curiam).

For these reason, the judgment is AFFIRMED.

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[1] While a homestead may embrace both a residence homestead on one lot and a business homestead on an entirely separate lot, provided both are in the same urban community, they are nevertheless but separate parts of a single homestead. There cannot be two homesteads in the sense of a residence homestead in one urban community and a business homestead in another, nor can a family or a single person have both an urban and a rural homestead. Realty Trust Co. v. Koger, 70 S.W.2d 448, 451 (Tex. Civ. App. 1934, writ ref'd); Purdy v. Grove, 35 S.W.2d 1078, 1081-82 (Tex. Civ. App. 1931, writ ref'd); Rutherford v. Hughes, 103 F. Supp. 161, 163-65

(E.D. Tex. 1952), rev'd on other grounds, 201 F.2d 161 (5th Cir. 1953); Commerce Farm Credit Co. v. Sales, 288 S.W. 802 (Tex. Com. App. 1926, holdings approved).

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 81-1502
Summary Calendar

D. C. Docket No. CA-2-81-136

IN THE MATTER OF: ROY HAWKELL DAWKINS AND MARY LORENA DAWKINS, Debtors.

FOY HAWKELL DAWKINS and
MARY LORENA DAWKINS,
Appellants,

versus

JODY DAWKINS FENSLAGE
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Before RUBIN, SAM D. JOHNSON and GARWOOD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that

the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that appellants pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

March 24, 1982.

ISSUED AS MANDATE: May 3, 1982.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

81-1502

In the matter of: FOY HASKELL DAWKINS and MARY LORENA DAWKINS, Debtors.

FOY HASKELL DAWKINS and
MARY LORENA DAWKINS,
Appellants,

versus

JODY DAWKINS FENSLAGE,
Appellee.

- - - - - -

Appeal from the United States District Court
for the Northern District of Texas

- - - - - -

ON PETITION FOR REHEARING
(April 21, 1982)

Before Rubin, Sam D. Johnson and Garwood, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Alvin B. Rubin
United States Circuit Judge

"Filed U.S. Court of Appeals April 21, 1982
Gilbert F. Ganucheau, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISRICT OF TEXAS
AMARILLO DIVISION

IN RE:	)	
	)	
FOY HASKELL DAWKINS	)	
and	)	
MARY LORENA DAWKINS	)	
	)	
DEBTORS	)	
	)	
FOY HASKELL DAWKINS	)	CIVIL ACTION
NO. and	)	CA-2-81-136
MARY LORENA DAWKINS,	)	
Plaintiffs	)	
	)	
V.	)	
	)	
JODY DAWKINS FENSLAGE,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Foy Haskell Dawkins and Mary Lorena Dawkins, debtors, appeal from a judgment entered by the Honorable Bill Brister, a Bankruptcy Judge for the Northern District of Texas, denying and dismissing a complaint by the Debtors to avoid the deed of the United States Marshal to Jody Fenslage, dated November 13, 1978, conveying to her the title to the West one-half (W 1/2) of Section 172, Block B-4, H&GN Survey, Cert. 15/3465, Armstrong County, Texas. The issues on appeal are:

1. Whether appellant debtors were denied the right of trial by jury;

2. Whether the Court erred in concluding that the subject land was not the homestead of the appellants at the time the judgment lien attached; and

3. Whether the Fenslage judgment (under which the sale by the United States Marshal was conducted) was a voidable preferential transfer.

I.

Jody Fenslage recovered a judgment against Debtors and others in the amount of $130,000 in this Court, CA-2-76-126. On August 17, 1978, Jody Fenslage filed, indexed and recorded in Armstrong County abstracts of judgment in accordance with the requirements of V.A.T.S. Article 5447. At that time Debtors lived at 404 Wilson Street in Claude, Texas, and considered their home at that location as their homestead. Plaintiffs also owned the following rural property in Armstrong County, Texas:

> The West One-half (W 1/2) of Section 172, Block B-4, HG&N Survey, Cert. 15/3465, Armstrong County, Texas.

On August 26, 1978, Debtors sold the property at 404 Wilson Street to their daughter, Anita Foy Fetke, although they continued to live at that address.

Debtors appealed to the Court of Appeals for the Fifth Circuit, although they did not file a supersedeas bond. On October 6, 1978, the U. S. Marshal levied on the half section of rural land, and on November 7, 1978, the land was sold to Jody Fenslage, the highest bidder. The Debtors seek to avoid sale of this land.

On November 6, 1980, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Couirt. Fenslage v. Dawkins, et al., 629 F.2d 1107 (5th Cir. 1980).

On February 2, 1981, Debtors filed a petition in bankruptcy for relief under Chapter XI.

II.

Appellant Debtors contend that they were improperly denied a trial by jury. Rule 7004(g) of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Northern District of Texas state that:

> If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury shall be accorded it, if his demand is served ... if he is not the applicant, within 10 days after service on him of the notice of filing of the application.

A copy of the notice of filing of application for removal was served upon debtors through their counsel. Debtors replied in a motion and answer, in which they moved on page 2, that:

> 4.b. Prior to the occasion of a time set for a hearing on an Adversary proceeding, these Debtors are by law permitted an opportunity to then elect whether or not Debtors may desire a trial by jury.

and on page 3, that:

> e. Authorization for an election of trial by jury should be afforded both parties prior to a time setting of an adversary hearing,

Such language is clearly not a request for a jury trial. Instead, it requests authorization for an election of a jury trial, at a future date. Such authorization is not contemplated by the bankruptcy rules as stated in Rule 7004(g):

> The failure of a party to make demand as directed constitutes a waiver by him of trial by jury.

The Court concludes that the Debtors failed to properly request a jury trial under Rule 7004(g), and thus were not entitled to trial by jury.

III.

Appellant Debtors contend that the Bankruptcy Judge erred in concluding that the half-tract of 200 acres was not the homestead of the Debtors at the time that the judgment liens attached.

Under V.A.T.S. Article 5549 an abstract of judgment operates from the date of proper recording and indexing as a lien. The filing of an appeal does not preclude the perfection of an abstract of judgment, and affirmance will result in a lien dating from the date of the proper filing of the abstract of judgment. Semple v. Eubanks, 13 Tex. Civ. App. 418, 35 S.W. 509 (1896). Therefore, in the present case, the judgment lien dates to August 17, 1978, when Jody Fenslage properly filed her abstracts of judgment.

A judgment lien has precedence over a subsequently acquired homestead right. Baird v. Trice, 51 Tex. 555 (1879); Johnson v. Prosper State Bank, 125 S.W.2d 707 (Tex. Civ. App. -- Dallas 1939, writ ref'd); First Realty Bank & Trust V. Youngkin, 568 S.W.2d (Tex. Civ. App. -- Eastland 1978, no writ). As a result, the half-tract of 200 acres must have been the homestead of the debtors on August 17, 1978, for the homestead exemption to save the 200 acres from the judgment lien and subsequent execution sale.

Without an abandonment of an existing homestead, the homestead character cannot be affixed to another property. Archibald v. Jacobs, 6 S.W. 177 (Tex. 1887); Floyd v. Rice, 444 S.W. 2d 834 (Tex. Civ. App. -- Beaumont 1969, writ ref'd n.r.e.); Towery v. Plainview Building and Loan Association, 99 S.W.2d 1039 (Tex. Civ. App. -- Amarillo, 1936, writ ref'd). The mere intention to abandon one homestead and to create another does not suffice. Little v. Baker, 11 S.W. 549 (Tex. 1889); Bass v. Ware, 203 S.W.2d 1001 (Tex. Civ. App.-- Waco 1947, writ ref'd n.r.e.) Even if the Debtors had been planning the sale of the property at 404 Wilson Street and the building of a new residence on the rural acreage prior to August 17, 1978, they did not perform acts sufficient to demonstrate abandonment of their present homestead. As a result, at the time that the judgment lien attached, the homestead of the Debtors remained at 404 Wilson Street. The Court finds that the Bankruptcy Judge did not err in concluding that the rural half-tract of land was not impressed with a homestead character at the time of attachment of the judgment lien.

IV.

Appellant Debtors claim that the Fenslage judgment (under which the sale by the United States Marshal was conducted) was a preferential transfer and that therefore the judgment lien should be set aside under §547 of the Bankruptcy Code. The provisions of §547 set forth the requirements necessary for the avoidance of specified transfers made within three months of the filing of the bankruptcy petition. The Court has already found that under the holding of Semple v. Eubanks, supra, the lien was perfected more than two years before the filing of the petition in bankruptcy. For that reason alone the judgment lien was not a voidable preferential transfer. The Court therefore does not reach the question of whether the judgment lien would

have been such a transfer if it had been perfected within three months of the bankruptcy.

V.

For the foregoing reasons the decision of the Bankruptcy Judge should be affirmed.

It is so ORDERED.

ENTERED this 15th day of September, 1981.

s/s Mary Lou Robinson
United States District
Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

IN RE:	)	
	)	
FOY HASKELL DAWKINS	)	
and	)	
MARY LORENA DAWKINS	)	No. 281-00013
	)	
DEBTORS	)	(Chapter 11)
FOY HAWKELL DAWKINS	)	
and	)	
MARY LORENA DAWKINS	)	
Plaintiffs	)	
	)	
VS.	)	Adversary No.
	)	281-0013
	)	
JODY FENSLAGE	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER

The debtors, Foy Haskell Dawkins and Mary Lorena Dawkins, had instituted these proceedings in the 47th Judicial District Court of Armstrong County, Texas, seeking to avoid a Marshal's deed to a tract of real estate to their former daughter-in-law, Jody Fenslage. They allege that the subject real estate was their homestead and was therefore not subject to levy by the United States Marshal under a judgment against them obtained by Jody Fenslage. After the proceedings were filed in the state court the debtors filed petition for order for relief under Chapter 11 of Title 11, United States Code. Jody Fenslage timely removed these proceedings to the bankruptcy court.

Trial of the issues was conducted by the court sitting without a jury on March 31, 1981.

The following factual summary, which was derived from admissions in the pleadings and from the evidence adduced at trial, constitute the findings of fact contemplated by Rules of Bankruptcy Procedure, Rule 752.

The debtors, Foy Haskell Dawkins and Mary Lorena Dawkins, are the parents of Jesse Arnold Dawkins, Donald Ray Dawkins (the former husband of Jody Dawkins Fenslage) and Anita Foy Bedkey. Jody Fenslage and Donald Ray Dawkins were divorced in 1975. The divorce decree awarded custody of two minor children of the marriage to Jody Fenslage, the mother. During the summer of 1976, while Jody Fenslage was residing in Arizona, the children visited their father at his home in Texas. Instead of returning the children to the custody of their mother at summer's end, Donald Ray Dawkins fled to Canada with the children.

Jody Fenslage filed diversity action in CA2-76-126 in the United States District Court for the Northern District of Texas at Amarillo against her former husband, his parents and other of his relatives, alleging that they conspired to take and conceal her children and that they intentionally inflicted mental anguish upon her. After trial the jury found that certain of the defendants had committed the acts as charged and awarded both compensatory damages and punitive damages against the individual defendants. The district judge entered judgment against the debtors, Foy Haskell Dawkins and Mary Lorena Dawkins, in the sum of $80,000.00 ($65,000.00 compensatory and $15,000.00 punitive damages), jointly and severally, with interest at the rate of 9% per annum, which was filed by the clerk on August 17, 1978.,

On that same date of August 17, 1978, the district clerk issued abstracts of the judgment which Jody Fenslage immediately recorded that same day in the Judgment Records of Armstrong

County, Texas. The effect of the recording of the abstracts was to impress a judgment lien against all of the non-exempt real estate owned by the debtors in Armstrong County, Texas.

On August 17, 1978, when the abstracts of judgment were recorded, the debtors owned three tracts of real estate in Armstrong County, Texas--a residence at 404 Wilson Street in Claude, Texas, which they had occupied and claimed as their urban homestead since 1975, another tract of real estate on Hermosa Street in Claude, Texas, upon which they had earlier expressed an intention to build a residential homestead, and the subject half section (324 acres, more or less) of ranch land in a rural area of the county. Nine days later, on August 26, 1978, the debtors conveyed the residence at 404 Wilson Street in Claude, Texas (which until that date they had claimed as residential homestead), to their daughter, Anita Foy Bedkey, and her husband, alleging consideration of $8,000.00 cash and vendor's lien note for $25,000.00. They commenced preparations to construct a residence on the half section of rural land and claimed from that date a homestead in two hundred acres of that half section as authorized by V.A.T.S. Article 3833.(1) They staked and dug a foundation for a residence to built on the tract, they moved some building material to the site, they arranged for an electric drop to be extended to the site, and they prepared to dig a well. They continued to live at the 404 Wilson Street addressed and never completed the proposed residence on the ranch land.

The debtors had perfected an appeal of the judgment to the United States Court of Appeals for the Fifth Circuit. However, they filed no supersedeas bond. On October 6, 1978, the United States Marshal levied on the half section of rural land. At the sale on November 7, 1978, Jody Fenslage's bid of $25,000.00 was the

highest bid for the tract. It is the United States Marshal's deed to Jody Fenslage of the subject half section--the West one-half (W/2) of Section 172, Block B-4, H&GN Survey, cert. 15/3465, Armstrong County, Texas--which the debtors seek to avoid by this action.

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court on November 6, 1980. Fenslage v. Dawkins et al, 5th Cir. 1980, 629 F2d 1107. The debtors filed their chapter 11 petition 88 days later on February 2, 1981.

The debtors present two theories of recovery. First, they contend that two hundred acres of the subject half section of ranch land was their homestead at the time of the Marshal's sale on November 7, 1978, and thus was exempt from execution. Second, they contend that the judgment did not become final until the Fifth Circuit affirmed the judgment on November 7, 19080, which was less than 90 days before the Chapter 11 petition was filed, and that the judgment lien is thus avoidable. The debtors can prevail on neither of those theories.

Jody Fenslage recorded her abstracts of judgment on August 17, 1978. Those abstracts of judgment comported with the requirements of V.A.T.S. Article 5447, which identifies the data which must be contained in an abstract of judgment. When those abstracts of judgment were recorded in Armstrong County, Texas, the debtors were claiming the residence at 404 Wilson Street in Claude, Texas, as their homestead. Although the tesimony did not develop precisely when the debtors formed an intention to claim a rural homestead in 200 acres of the half section, the earliest date that such claim of homestead could have been effective was August 26, 1978, when the urban residential homestead was conveyed to their daughter. On that date the entire half section of ranch land was already

subject to the judgment liens which secured the $80,000.00 federal court judgment.

Those judgment liens against the half section were effective from August 17, 1978, notwithstanding that the judgment was not affirmed by the Fifth Circuit until November 6, 1980. No supersedeas bond was filed by the debtors. The filing of an appeal does not preclude a successful litigant from abstracting his judgment and, in case of affirmance, the lien dates from the time of its proper recording and indexing. Semple v. Eubanks, 13 Tex. Civ. App. 418, 35 S.W. 509. Jody Fenslage, the person who holds the judgment liens, is entitled to all of the benefits that would have resulted om those judgment liens had there been no appeal for the affirmance gives effect to the original judgment. Texas Trunk Railway Company v. Jackson, 85 Tex. 607, 22 S.W. 1030.

The appellant in Roman v. Goldberg, 7 SW2d 899, had advanced substantially the same challenge that the debtors are making in this case--that is, that having perfected an appeal the appellee was not entitled to take any steps to affix a lien on any property. The court, citing Semple v. Eubanks, supra, stated, "this question, we think, has been decided adversely to appellant's contentions."

Thus, the judgment liens date, and are effective, from August 17, 1978, and not from the date of affirmance of the judgment on November 6, 1980.[2] Those judgment liens held by Jody Fenslage on August 17, 1978, were effective against all non-exempt real estate owned by the debtors in Armstrong County, Texas, including the subject half section of rural ranch land. The subsequent claim of homestead in 200 acres was subject to those liens. The execution sale on November 7, 1978, and the subsequent deed to Jody Fenslage on November 13, 1978, recorded in Volume 85, Page 367 et seq. Deed Records of

Armstrong County, Texas, were effective to convey title of the West one-half (W/2) of Section 172, Block B-4, H&GN Survey, Cert. 15/3465, Armstrong County, Texas, to Jody Fenslage, and that deed and conveyance may not be avoided by debtors.

LET JUDGMENT BE ENTERED ACCORDINGLY.

The clerk is directed to file this memorandum and order in the adversary proceeding, to file a signed copy thereof in the Chapter 11 proceedings of the debtors in number 281-00013, and in the Chapter 11 proceedings of Jesse Arnold Dawkins and Barbara Beth Dawkins, in 281-00011, and to furnish a copy to each attorney of record and to the United States Trustee.

Entered this 1st day of May, 1981.

s/Bill H. Brister
Bankruptcy Judge

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[1] Art. 3833. Homestead.

(a) if it is used for the purpose of a home, or as a place to exercise the calling or business to provide for a family or a single, adult person, not a constituent of a family, the homestead of a family or a single, adult person, not a constituent of a family, shall consist of:

(1) for a family, not more than two hundred acres, which may be in one or more parcels, with the improvements thereon, if not in a city, town, or village; or

(2) for a single, adult person, not a constituent of a family, not more than one hundred acres, which may be in one or more parcels, with the improvements thereon, if not in a city, town, or village; or

(3) for a family or a single, adult person, not a constituent of a family, a lot or lots, not

to exceed in value ten thousand dollars at the time of their designation as a homestead, without reference to the value of any improvements thereon, if in a city, town, or village.

(b) Temporary renting of the homestead shall not change its homestead character when no other homestead has been acquired.

[2] In any event the provisions of §67 of the Bankruptcy Act which permitted avoidance of liens obtained by attachment, judgment, levy or other legal or equitable process within four months of the filing of the petition were not carried forward into the Bankruptcy Code.

Office - Supreme Court, U.S.
FILED
AUG 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-102

In The

Supreme Court of the United States

October Term, 1982

FOY HASKELL DAWKINS
AND MARY LORENA DAWKINS,
Petitioners

vs.

JODY DAWKINS FENSLAGE,
Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Roman v. Goldberg, 7 S.W.2d 899 (Tex. Civ. App. 1928) 2

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No. 82-102

In The

Supreme Court of the United States

October Term, 1982

FOY HASKELL DAWKINS
AND MARY LORENA DAWKINS,
Petitioners

vs.

JODY DAWKINS FENSLAGE,
Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Mr. and Mrs. Dawkins do not even suggest that special and important reasons require granting of the petition, and examination of the questions presented confirms that no important issue of federal law arises.

The first question is whether Mr. and Mrs. Dawkins had a valid Texas homestead exemption for land where they never lived at a time when they claimed property

where they were living as their homestead. The court of appeals properly held that Texas allows only one homestead, and no new homestead can be acquired until abandonment of the old. *Archibald v. Jacobs*, 6 S.W. 177, 178-79 (Tex. 1887).

Mr. and Mrs. Dawkins next contend that an execution sale to foreclose a judgment lien created years before the filing of a petition for reorganization constitutes a voidable transfer under 11 U.S.C.A. § 547 (1979). This is also a Texas law question. Section 547(e)(1)(a) provides that "a transfer of real property . . . is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee."

Under applicable Texas law, the subsequent affirmance of a trial court judgment is not necessary to perfect a judgment lien. *Thulemeyer v. Jones*, 37 Tex. 560 (1872); *Roman v. Goldberg*, 7 S.W. 2d 899 (Tex. Civ. App. 1928). *See also Smith v. Kale*, 32 Tex. 290 (1869). The court of appeals properly followed these holdings.

The last question presented by Mr. and Mrs. Dawkins is whether they were "illegally" denied a jury trial. Their pleadings contained no demand for jury trial. They appeared at the bench trial and — without protesting the lack of a jury — announced that they were ready. They objected to the absence of a jury for the first time only after they lost in the trial court. The holding below merely follows well-established precedent that a jury trial may be waived. *Chandler Supply Co. v. GAF Corp.*, 650 F.2d 983 (9th Cir. 1980); *Duncan v. First National Bank*, 597 F.2d

51 (5th Cir. 1979); *Bush v. Allstate Insurance Co.*, 425 F.2d 393 (5th Cir.), *cert. denied*, 400 U.S. 833 (1970).

In short, there is no question of substance raised by this petition. Mr. and Mrs. Dawkins have had their contentions reviewed thoroughly by written opinions in the bankruptcy court, the district court, and the court of appeals. The petition for certiorari should be denied.

Respectfully submitted,

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